No. 11438

In the United States Circuit Court of Appeals

In and for the Ninth Circuit

DAVID KRAMER,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

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HISTORY OF THE CASE

On May 28, 1946, the United States attorney at Los Angeles, California, filed Information No. 18539 charging defendants Pioneer Provision Co., Inc., and David Kramer in 21 counts with violation of the Emergency Price Control Act of 1942. 50 U. S. C. App. 901 et seq.

The charging language of each and every count is in identical language, viz.:

> " . . . in the Southern District of California, the defendants, Pioneer Provision Co., Inc., a corporation did, and caused others to offer, solicit, attempt and agree to sell, and did sell and caused others to sell to . . . certain meat items, *as shown on Invoice No.* ..... *of the Pioneer Provision Co., Inc.,* for a price per pound which was as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239 thereunder." (Transcript of Record, pages 2-13 inclusive.)

The wording of all counts with the exception of the date, Invoice No. and the person to whom the meat items were sold are identical.

On July 5, 1946, the defendants through their attorney of record David C. Marcus filed their "Demand for Bill of Particulars" respecting each count of the indictment demanding that defendants be advised and furnished with

> "(1) The contents of each and every invoice as numbered in each and every count.
>
> "(2) The amount in excess if any 'for which the said meat sold per pound which was . . . in excess of the maximum price for said meat items permitted under the Emergency Price Control Act of 1942 . . . '

"(3) What other persons the defendants caused to sell such meat items . . .

"(4) The permitted price of said meat under the said Emergency Price Control Act and the amount sold in excess under said Emergency Price Control Act . . .

"These defendants . . . are unable to properly present their motion to dismiss *attach said information and prepare and present their defense unless they are informed of the entire contents of the purchase orders described and designated as before.*" (Italics ours.) (Transcript of Record, pages 13-14 inclusive.)

On July 8, 1946, the Demand for Bill of Particulars came on for hearing before the Honorable Campbell E. Beaumont. The following appears of record:

"Los Angeles, California
Monday, July 8, 1946. 2 p. m.

THE CLERK: United States vs. Pioneer Provision Company and David Kramer.

MR. RITZI: If the court please, the government feels that many of the requests for the bill of particulars are sound. I think counsel and I can enter into certain stipulations that will save the court a lot of time in hearing this matter. I think portions of the bill are good.

THE COURT: Anything you and Mr. Marcus agree upon will be satisfactory to the court.

MR. RITZI: If the court please, the government is willing to furnish Mr. Marcus with the contents of the invoices, the amount in excess of the

ceiling price, and the ceiling price of the meat itself. However, as to point No. 3, what other persons the defendants caused to sell such meat items as contained in each, every and all counts in said information, the government is not willing to stipulate to that.

MR. MARCUS: I will waive that, your Honor.

THE COURT: What about No. 4?

MR. RITZI: Yes, that is the ceiling price; we will furnish him with the ceiling price.

THE COURT: *Then you will furnish him with all of the information requested in subdivision 1, 2 and 4?*

MR. RITZI: *That is correct.* [8]

MR. MARCUS: Your Honor, we were discussing the matter of procedure here. *As I understand, a copy will be furnished me of the original filed with the court, because the way the information is drawn, if the quotation on the statement is not in excess that would call for a dismissal of the action.* (Italics ours.)

THE COURT: *That is the usual procedure.*

MR. RITZI: *That is true. I will not do it, myself.* (Italics ours.) This matter was given to me about fifteen minutes ago. It was handled by another assistant in the office, and will be assigned to another one. I just came down for this matter.

THE COURT: *The way to proceed will be as outlined by Mr. Marcus.* (Italics ours.)

MR. RITZI: That is correct. We will file those particulars with the court and furnish Mr. Marcus with a copy.

THE COURT: Court is now recessed. [9]"
(Transcript of Record, pages 40-41.)

On July 19th before the same court, Mr. Arthur Livingston representing the government the following appears of record:

"For the Defendant: David C. Marcus, Esq., 213 South Spring Street, Los Angeles, California. [10]

Los Angeles, California
Friday, July 19, 1946. 4:00 p. m.

MR. LIVINGSTON: This is the matter that I might state I was before your Honor on yesterday. It is cause No. 18539, United States vs. Pioneer Provision Company. Mr. Marcus represents the defendant corporation as well as the individual defendant, David Kramer. *In this case your Honor ordered the government to file a bill of particulars by July 22, 1946, which is next Monday.* The case was at that time, at about that time, being handled by Mr. Horgan, who is no longer with the office, and it was just assigned to me yesterday. *Because it will be necessary to have certain photostats made and because it will be necessary to have certain transcripts of Grand Jury testimony prepared,* which I am now informed could not be prepared until the very last part of next week, *I move the court to continue the time to file the bill of particulars for two weeks from July 22nd.*

MR. MARCUS: No objection, your Honor.

THE COURT: It is so ordered.

MR. LIVINGSTON: The court, then, upon the basis of the bill of particulars being filed July

22nd, set the time for arraignment and plea as of July 29th. Will your Honor then continue that for two weeks, so that *the defendant does not have to appear on the 29th?*

MR. MARCUS: No objection. [11]

THE COURT: Is this an information?

MR. LIVINGSTON: Yes. No bond has been set.

THE COURT: It is so ordered. [12]" (Transcript of Record, pages 42-43.)

NO BILL OF PARTICULARS GRANTED BY THE COURT WERE EVER FURNISHED BY THE GOVERNMENT, NOR SUPPLIED TO THE DEFENDANT.

On July 26, 1946, the defendant, David Kramer, appeared before the Court and the following appears of record:

"THE CLERK: United States vs. Pioneer Provision Company, Inc., and David Kramer.

MR. TOLIN: The defendant, David Kramer, is in court. I am advised that the defendant, David Kramer, desires at this time to withdraw—or, he has not pleaded, but he desires to enter a plea of nolo contendere to counts 2, 4, 6, 13, 17, and 21. The government does not oppose the plea of nolo contendere." (Transcript of Record, page 43.)

"THE COURT: Mr. Marcus, will you indicate to the court what the circumstances are that make you believe that the court should consent to the plea of nolo contendere?

MR. MARCUS: Your Honor, I have examined to some extent each individual count in this case. Your Honor has asked me to indicate to the court the reasons. The details of each count, as I understand it, might be a bookkeeping error. If your Honor will—the motion for the bill of particulars was based upon the fact that it is alleged that certain meat items, and I am quoting from each count in this information, as shown on invoice No. 2700 of Pioneer Provision Company, were sold for a price per pound which was as the said defendants then and there well knew in excess of the maximum price for the said meat items permitted under the Emergency Price Control Act.

As I understand, the invoices themselves might be in error. That is the extent of my information.

THE COURT: Mr. Tolin, what have you to say about it? What about the matter of the actual intent on the part of the defendant?

MR. TOLIN: *This is a case, if the court please, in which we have had some discussion in chambers with the court. I think the defendant had the requisite intent to violate the act; however, the defendant has come in with a very frank and* [15] *fair attitude toward the government in the matter, and we believe that he was led by others sufficiently that we do not oppose the nolo plea.*

THE COURT: Under the circumstances and the apparent belief of the United States Government that it is a proper case for nolo contendere, the court will consent to it." (Italics ours.) (Transcript of Record, pages 44-45.)

"THE CLERK: As to counts 2, 4, 6, 13, 17, and 21 of the information, do you plead nolo contendere?

THE DEFENDANT: I do, nolo contendere.

THE CLERK: As to counts 1, 3, 5, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19 and 20 what is your plea?

THE DEFENDANT: Not guilty.

THE COURT: The court will fix the time for pronouncing judgment and for hearing the report of the probation officer on the 12th day of August at 3:00 o'clock in the afternoon and will fix that date as the time for setting the case for trial upon the other counts." (Transcript of Record, page 46.)

On August 12, 1946, defendant appeared and the following occurred of record:

"MR. LIVINGSTON: If the court please, might this matter be continued for the purpose of sentence until September 16th?

THE COURT: What is the purpose or reason for the continuance?

MR. LIVINGSTON: This matter, if the court please, in the first place, I do not have the probation report. However, as I understand it from the probation office—

THE COURT: It has been filed. I have it.

MR. LIVINGSTON: This is a matter in which this defendant has co-operated with the government, and it is suggested that the time for sentence be continued. It is a matter which I have discussed with your Honor, and I understand a continuance is satisfactory to Mr. Marcus.

THE COURT: *Yes. You mentioned it to the court just briefly during the recess, but whatever the reason is I would like to have you make a statement now, Mr. Livingston.* [21]

MR. LIVINGSTON: Yes.

This defendant is co-operating with the government in connection with some other matters, and for the purpose—

THE COURT: Other matters? You mean other indictments?

MR. LIVINGSTON: That is right, sir." (Italics ours.) (Reporter's Transcript, pages 48-49.)

"THE COURT: That is just a request on the part of the government to continue it. There has been no understanding here that the matter would be continued at all. But the court will continue it at the request of the government until the 16th of September at 3:00 o'clock. [22]" (Reporter's Transcript, page 50.)

The cause was continued until September 16, 1946, and on said date continued again until September 17, 1946.

On this date (September 17, 1946) the defendant appeared for sentence. After considerable discussion the details of which we will discuss hereafter in this brief the defendant Kramer was sentenced to serve (1) one year on count 2, to pay a fine of $3,000 on count 3, on counts 6, 13, 17 and 21 imposition of sentence was suspended for the period of one year after defendant "shall have been released from prison." (Transcript of

Record, pages 62-63.) Thereupon and upon the posting of a $5,000 appearance bond execution was stayed until "the 24th day of September at 3:00 o'clock in the afternoon." (Transcript of Record, page 67.)

On September 23, 1946, at 4:15 P. M., in open court the defendant filed "Motion to Withdraw Plea of Nolo Contendere" and his "Motion to Reconsider Sentence Under Rule 35." (Transcript of Record, page 68.) The contents of said motions may be found in the Transcript of Record, pages 24, 25, 26. At said time appellant's counsel indicated to the Court

> "I am presenting the motion alone today in connection with this matter for the reason *that your Honor has stayed the execution until tomorrow . . . but we intend further, your Honor, in this matter to file a petition for a Writ of Coram Nobis.*
>
> "There are many matters that I believe the Court should be acquainted with that have occurred outside of the record, and with which Your Honor is not acquainted in this case. . . . I did not at this time, Your Honor, wish to argue this motion to withdraw the plea because I believe I would be duplicating my efforts and my argument in connection *with the motion of Coram Nobis that I intend to file in this case."* (Transcript of Record, pages 68-69.)

The Court was again requested by defense counsel permission to file his petition of *Coram Nobis* and the Court made the following observations:

> "THE COURT: Are you ready for the court, then, to rule upon the motion to withdraw the plea?

MR. MARCUS: I would ask your Honor to grant us time so that this point could be briefed, *and permit us to file the petition for coram nobis and to argue it at the same time that we argue this motion to withdraw the plea.*

THE COURT: Now, Mr. Marcus, the court, it seems, has been very considerate of your motions in this matter. I do not expect to be here next week, and whatever is done by this court will have to be done this week.

MR. MARCUS: I could prepare the motion and prepare the affidavits before the end of the week, your Honor.

THE COURT: When did the court order that this stay of execution be effective to, what date?

MR. MARCUS: To tomorrow afternoon at 3:00 o'clock.

THE COURT: You be prepared to argue your motion by tomorrow afternoon at 3:00 o'clock and before that time if possible." (Transcript of Record, pages 69-70.)

After taking the statement of Mr. Tolin defendant's Counsel again requested the Court for permission to file his affidavit in support of his motion to vacate the plea. This the Court refused to do.

The following appears of record:

"THE COURT: Now, Mr. Marcus, you spoke something about an affidavit. Whose affidavit is it?

MR. MARCUS: Well, it will be Mr. Kramer's affidavit.

> THE COURT: Have you prepared it now?
> MR. MARCUS: I haven't prepared it.
> THE COURT: Let him be sworn and I will take his statement now. I want this matter concluded with the exception of the question of law to be argued tomorrow. Just let him be sworn and make his statement *now. He won't have to make an affidavit."* (Transcript of Record, pages 89-90.)

David Kramer was therefore called as a witness and testified. At the close of his testimony, Mr. Marcus, his counsel, made the following motion:

> "The motion in addition may be considered as a motion to set aside the Nolo Contendere plea and to withdraw the plea of Nolo Contendere upon the additional ground . . . that there were inducements held out to this defendant. . . . " (Transcript of Record, page 122.)

We believe that the foregoing sufficiently establishes a basis for a consideration of the defendant's motion to set aside the plea of Nolo Contendere, and upon which we will proceed to argue the evidence permitted to be introduced in support of this motion and the legal effect of such proof.

However, the Court's action in this regard in forthwith compelling the defendant to take the stand and testify in lieu of filing his formal affidavit and motion because as the Court indicated "Mr. Marcus, the Court it seems has been very considerate of your

motions in this matter. I do not expect to be here next week, and whatever is done by this Court *will have to be done this week,"* was prejudicial error alone warranting a reversal. The matter will be further discussed under a different heading.

I.

THE INFORMATION DOES NOT STATE A PUBLIC OFFENSE

Rule 7 (c) of the Rules of Criminal Procedure effective March 21, 1946, provides in part as follows:

"Rule 7—

"The Indictment and The Information

. . .

"(c) The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . "

See,

Lowenbury vs. United States, 156 Fed. Rep. 2nd 22.

Although the Bill of Particulars requested by defendant and ordered by the Court would have appraised the defendant of the specific offenses and over ceiling violations charged yet none were ever furnished, before the entry of the plea of nolo contendere. Although the government agreed the motion was well taken and

would be furnished. This Court will take judicial knowledge that there were hundreds of different ceiling prices for different *kinds, grades,* cuts of meats and meat products during the existence of meat ceiling prices not one being alleged in any count of the information. Reference is made in each count of the information to certain invoices, but the specific violation, the contents of the invoice, the over-ceiling price charged, the legal permissible ceiling price and the kind, grade, cut of meat or meat product are now where found or alleged.

This Court may take judicial knowledge that many "meat items" were never subject to price regulation during the war. Then how could defendant have knowledge of the specific offense of which he is charged if not one "meat item" was ever alleged.

The test as outlined under the revised rules whether the complaint states an offense may be found in *Lowenburg vs. United States, supra:*

> "An indictment which merely charges a defendant with refusing to perform the duties assigned to him is wholly insufficient to apprise him of the specific offense with which he is charged or which he is expected to meet so as to enable him to prepare his defense thereto or *plead the judgment of guilty if any as a bar to a further prosecution.*"

This Kramer information charges that "David Kramer . . . did . . . sell to . . . certain

meat items as shown on Invoice No. ..... for a price per pound . . . in excess of the maximum price for said *meat items* permitted under the Emergency Price Control Act of 1942. . . . " No one can state from this information what "meat items" were charged, or intended to be charged, how many appeared on said Invoice No. ..... the kind, character, grade and cut of the "meat item." All these things we suggest for how could Kramer "plead the judgment of guilty as bar to a further prosecution" from the meagre, slim and entirely hypothetical information contained in the charge *which information* would have to be gathered from a document outside the record contained in a certain "invoice" No. ..... the contents of which was never disclosed.

The essential elements of an indictment or information were stated by the Supreme Court in *United States vs. Hess,* 124 U. S. 483, 8 S. Ct. 571, 574, 31 L. Ed. 516, as follows:

> "The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone."

The allegations in each count of the information are not even alleged in the mere words of the statute.

The contents of—"Maximum Price Regulations Nos. 148, 169 and 239 . . . " are unknown (and we state to this Court parenthetically, we have, after very careful search and inquiry of all possible and available sources, been unable to find these regulations). Certainly this Court will not take judicial knowledge of "Maximum price regulations Nos. 148, 169 and 239 . . . "

Then without alleging the specific "meat items," the maximum price regulation and the actual charged price how could Kramer ever plead the conviction as a bar, upon a subsequent prosecution.

As was stated in *Frankfort Distilleries, Inc. vs. United States,* 10 Cir., 144 Fed. 2d 824, 830:

> "Ordinarily it is not sufficient to charge the offense in the words of the statute creating the offense, unless the words themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the crime intended to be punished. Where the statute is general in terms and fails fully, directly, and expressly to set forth with certainty and without ambiguity all of the essential elements necessary to constitute offense, the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed."

See, also,

Mitchell v. United States, 10 Cir., 143 F. 2d 953, 955;

Kane vs. United States, 8 Cir., 120 F. 2d 990, 992;

Evans vs. United States, 153 U. S. 584, 587; 14 S. Ct. 934, 38 L. Ed. 830;

United States vs. Crummer, 10 Cir., 151 F. 2d 958, 962;

Harper vs. United States, 8 Cir., 143 F. 2d 795, 802;

Frankfort Distilleries, Inc., vs. United States, 10 Cir., 144 F. 2d 824, 830.

All the foregoing citations were quoted with approval in *Lowenbury vs. United States* wherein the Court through Circuit Judge Huxman stated:

> "While the strict rules of pleading in criminal prosecutions have been relaxed, the fundamental functions and requirements of indictments have not been altered or modified. The purpose of an indictment still is to inform the accused of the offense with which he is charged, and this it must do with sufficient clarity to enable him to adequately prepare his defense and to plead the judgment of conviction, if any, as a bar to further prosecution."

We respectfully submit that the information, judged by the light of tested requirements, fails to allege a public offense. The Trial Court was therefore without jurisdiction to impose its judgment and sentence in the case.

In order to chronologically detail the considerable evidentiary matter introduced in support of appellant's

motions to "Reconsider and Reduce Sentence" and to "Withdraw Plea of Nolo Contendere" (Transcript of Record. pages 23 to 26) it will be necessary to quote extensively from different portions of the record not necessarily consecutively for which we must beg this court's indulgence.

It is an elemental principle of law that the defendant and his counsel have an intelligent and full understanding of the charge against him. It is the first requirement of due process.

> *Ammons vs. King,* 8 Cir., 133 F. 2d 270, 272;
> *Smith vs. O'Grady,* 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859.

As before recited in this brief, on July 8, 1946, it was agreed in open court the procedure to be followed. (See pages 3, 4.)

It was not until the hearing on the motion to withdraw the plea were the "invoices" mentioned in the information produced in Court by the Government and delivered to defendant's counsel. The following colloquy appeared between the Court and counsel.

> "MR. MARCUS: Your Honor, I would desire at this time to introduce as part of this testimony the statements that are alleged in these various counts to which the plea was entered.
>
> THE COURT: To do what?
>
> MR. MARCUS: The statements that are contained in the various counts that are alleged that show a price violation; and I submit that the statements, if introduced, will show that there was no price violation." (Transcript, page 114.)

"MR. LIVINGSTON: I have no objection, if the court please. I have—I lack one, is what I mean to say, of the statements. However, Mr. Marcus is in error. They are not statements; *they are invoices of the Pioneer Provision Company. As such they are used in the allegations not to show a violation, but merely as a list of the meat items sold.* They show on their face certain prices. Now, neither Mr. Marcus nor I are so naive as to think that these prices in themselves show an over-ceiling violation." (Transcript, page 115.)

"THE COURT: What position do you take in regard to that?

MR. LIVINGSTON: We take this position, that they have absolutely no materiality. In this interrogation if Mr. Marcus wishes them for whatever purposes he wishes them, we are giving them to him. But they certainly do not show the instance of this defendant. They are merely, as I have pointed out, the defendant's invoice upon which the meat items are listed. That is all they are for.

THE COURT: What is your position with regard to the payment in excess of the maximum price?

MR. LIVINGSTON: That is a matter of proof at the time of trial. We certainly don't claim that the prices on these invoices are over-ceiling prices." (Trainscript, pages 117-118.)

We now discover the real reason for not filing the Bill of Particulars, because the Government knew at all times that the invoices showed no over-ceiling violation. Defendant's counsel was without knowledge of

their content, until after the entry of the plea, the imposition of sentence and until on the hearing of the motion to vacate the plea the invoices for the first time were delivered to counsel. The U. S. attorney well knew, in view of the stipulation, that if the invoices showed no over-ceiling the case was to be dismissed. Their failure to advise defendant's counsel of their contents, their continuous objections to their introduction in evidence at the hearing (Transcript, pages 114-118 incl.) constituted a legal fraud upon the defendant. This lack of information in the complaint against the defendant constituted a failure to fully advise the defendant of the charge so that he would have an intelligent understanding of the offense and constituted a denial of due process.

Bergen vs. United States, 145 Fed. 2d 181.

The entry of the plea of Nolo Contendere was a waiver of defendant's fundamental rights and in strict parlance a "no contest" to the government's charge against which every reasonable presumption is indulged in.

Bergen vs. United States supra;
Glasser vs. U. S., 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680.

The failure of the government to advise the defendant and the Court that the invoice did not show an over-ceiling charge until after the entry of the plea, sentence and judgment, and then only at the hearing on the motion under the circumstances as indicated in

this case amounted in legal effect to the absorption of defendant's legal right by, to say the least, legal fraud. It was the plain duty of the prosecution when these facts became a matter of public record, in view of their stipulation, at the onset of this case, to have immediately and without further compunction or technical objection dismissed the entire proceedings. If this did not cast a cloud of suspicion upon the administration of justice, then it is difficult to imagine a situation that does. It is far better that one defendant go unpunished than that it be said that the officers of the law in charge of the prosecution of crimes should play fast and loose with their stipulations, their words and promises to persons charged with crime.

This was an unfair advantage the prosecuting officers should not be permitted to profit by. The professions of lack of knowledge by defense counsel of the contents of the invoices surely placed the U. S. attorney on notice that he and the defendant were relying on the fact that they did show an over-ceiling violation. The learned U. S. attorney admitted that the method of proving an over-ceiling violation was through "expert opinion." (Transcript, page 162 and 164.) If such be the proof necessary to establish the fact of an over-ceiling price then the layman cannot be blamed for the utter lack of knowledge of the over-ceiling price and the failure in this respect to allege such information in the complaint, deprived defendant of the right to be informed of the charge against him so that he could not again be charged with the same offense.

II.

THE INFORMATION AS STIPULATED BY COUNSEL AND ACQUIESCED IN BY THE COURT SHOULD HAVE BEEN DISMISSED WHEN THE "INVOICES" FAILED TO DISCLOSE AN OVER-CEILING CHARGE, OR VIOLATION.

At all times prior and subsequent to the inception of these proceedings the "invoices" were in possession of the United States attorney. (Transcript of Record, page 72.) These invoices had been delivered to the Government and were in their possession. After the plea of nolo was taken, the judgment entered and not until the argument on the motions were before the Court were the invoices produced by the United States attorney. It was then for the first time that the United States attorney admitted that the invoices *showed no over-ceiling charge or violation. The information should then have been dismissed or appropriate steps taken to abide by the solemn stipulation which would* have corrected the wrong committed upon the defendant. This the United States attorney refused to do.

We quote the record:

> "I have been advised by my client that the government is today and has been ever since the inception of this case in possession of those statements, and those bills which show that there was no excess price charged for these various meat items." (Transcript of Record, page 74.)

During the course of argument upon the hearing of the motions the following colloquy appears:

> "MR. MARCUS: I thought, your Honor, under that particular Section 35 that we would have a right to come in here and show this matter. *I don't know as yet to this date, your Honor, what those statements show,* only except what my client advises me. If there is a palpable injustice in this case, if those statements show that there was no violation of law, and no over-ceiling violations, I feel, your Honor, that we should be entitled to convey that information to the court." (Transcript of Record, page 105.)
>
> . . .
>
> "MR. MARCUS: I mean this: If those statements upon which these counts are predicated show that there is no violation of law, whatever sentence the court would pronounce would be severe, *because the court* would have no right or jurisdiction to impose any such fine or imprisonment if the statements that the Government has in their possession show that there was no violation of law." (Transcript of Record, page 106.)

Near the close of hearing the United States attorney made the following statement to the Court:

> "MR. LIVINGSTON: We are not prepared to prove the case now. The proof of the ceiling price is a technical matter to be proved at the time of trial by experts. . . .
>
> THE COURT: As I understood it the ceiling price was met by the invoice?

MR. LIVINGSTON: Correct.

THE COURT: That is the way I understood it yesterday.

MR. LIVINGSTON: Correct."

. . .

"THE COURT: Is it your understanding Mr. Livingston? Did the invoices represent the ceiling price?

MR. LIVINGSTON: That is my understanding.

THE COURT: Are you prepared so to show?

MR. LIVINGSTON: Not at this tme, if the court please.—That is a matter of expert opinion. . . . "

III.

THE DISTRICT COURT ERRED IN COMPELLING DEFENDANT TO FORTHWITH PROCEED UPON HIS SUGGESTION THAT HE DESIRED TO FILE A FORMAL PETITION FOR WRIT OF CORAM NOBIS AND SUPPORTING AFFIDAVITS.

Judgment and commitment was imposed on *September* 17, 1946. Within the time required by the Revised Rules, viz.: on September 23, 1946, the defendant filed his written Motions—"To Reconsider and Reduce Sentence." and "To Withdraw Plea of Nolo Contendere." (Transcript of Record, pages 23, 24, 25, 26.)

The record shows that at 4:15 P. M. on said date, September 23, 1946 (Transcript of Record, page 67) the

foregoing motions were filed in open Court, and served upon the United States attorney in attendance. (Transcript, page 68.) The Court then stated:

"The Court will take them up now."

Defendant's counsel stated:

"I am presenting the motion alone today in connection with this matter for the reason that your Honor has stayed the execution until tomorrow. In addition to that, we made a motion to reconsider and reduce the sentence under Rule 35, on the various grounds set forth. *But we intend further, your Honor, in this matter to file a petition for a writ of coram nobis.*" (Transcript, page 68.)

"*There are many* matters that I believe the court should be acquainted with that have occurred outside of the record, and with which your Honor is not acquainted in this case." (Transcript, pages 68-69.)

Counsel thereupon requested time to file his petition and motion and on three separate occasions at this session stated to the Court he desired time to file his petition and affidavits and to argue his foregoing motions so as not to duplicate his argument and take the Court's time in handling the matter. (Transcript of Record, pages 68, 69, 70, 71, 77.)

The Record discloses that the Court stated:

"Proceed Mr. Marcus. You may first present your motion to withdraw the plea." (Transcript, page 68.)

"MR. MARCUS: Well, your Honor, I thought it might be considered at the same time tomorrow.

THE COURT: *I would rather not. I don't have the time Mr. Marcus. You make your motion now. I was asked by Mr. Tolin to take this up now . . . notwithstanding the lateness of the hour I am ready to proceed with it and hear it.* (Transcript, page 71.)

and again,

I see no basis whatsoever for making the motion, not any. That is the court's present view of it, but I will not rule on it if you desire to present it further.

MR. MARCUS: *I do, your Honor, if the court please.*" (Transcript, page 70.)

Even the United States attorney suggested additional time to research the sufficiency of the information. (Transcript, page 71.) Defendant's counsel then stated to the Court all defendant's bills had been delivered to the Government prior to his entry into the case—

"which I have never as yet seen to this date"

and

"I am trying to get them, and *I think* the Government will deliver them to me." (Transcript of Record, pages 72-73.)

and again

"I have been advised by my client that the government is today and has been ever since the in-

ception of this case, in possession of those statements and those bills, *which show that there was no excess price charged for these various meat items.* (Transcript of Record, page 74.)

Thereupon Mr. Tolin, assistant United States attorney, made a lengthy statement to the Court, pages 77 to 89 inclusive.

Thereupon the Court said:

"Mr. Marcus, you spoke *something* about an affidavit. Whose affidavit is it?

MR. MARCUS: Well it will be Mr. Kramer's affidavit.

THE COURT: Have you prepared it now?

MR. MARCUS: I haven't prepared it.

THE COURT: Let him be sworn and I will take it. . . . *He won't* have to make an affidadavit." (*Transcript of Record,* pages 89-90.)

Defendant David Kramer was then sworn as a witness and testified at length, pages 89 to 119 of the transcript.)

Prior to adjournment to the following day and before the matter was submitted and during the formal hearing the Court made the following most significant observation:

"I am sure from not only the statements made by Mr. Tolin, *but from what I know of Mr. Tolin,* that he did not make any promise that this man would not be confined in prison; *that nobody else made any statement to Mr. Kramer who had a*

right to make it, or whom the defendant had a right to believe in.'' (Transcript, page 122.)

The Court directed the United States attorney to secure witnesses to testify against Mr. Kramer's statements that no over-ceiling charges were made (Transcript of Record, page 120) and adjourned Court at 6:00 P. M. until the following day at 1:00 P. M.

The proceedings amply demonstrate the state of mind of the learned presiding jurist. No rush of other business or the Court's desire to immediately dispose of what he believed were motions with "no basis whatsoever" (Transcript of Record, page 70) was justification to be indulged in in order to deprive the defendant of his inherent right to a full and fair hearing and the right to present the necessary supporting documents, papers and affidavits, and not have his position prejudiced or influenced by the Court's belief in and knowledge of the witness interested in the outcome of the case. Mr. Tolin was heard as a witness. His testimony was governed by the same rules of evidence as any other witness. Of what avail was it to the defendant to present his motion to vacate the judgment if the Court had determined *prior* to the calling of the witnesses to be sworn that the Court believed "That nobody else made any statement to Mr. Kramer who had a right to make it, or whom the defendant Kramer had a right to believe in." (Transcript of Record, page 122.)

If that statement by the trial judge did not indicate a prejudging of the witnesses' testimony who were later

called and testified *under oath*, including Mr. Tolin, then we are at a loss to find more convincing proof.

This was a serious matter. It involved the constitutional right of a defendant to a full, fair and complete hearing. It invokes the protective duty of the Trial Court to see that those whose very duty it was not to impose upon the defendant or to influence him in hope and faith of their protecting arm to change his plea which would subject him to years of imprisonment and thousands of dollars in fine.

If within the breast of the trial judge he had predetermined the subject under inquiry which had deprived the defendant of his constitutional right to a jury trial and the testimony of the witnesses then we respectfully submit he should have disqualified himself and permitted other learned jurists to sit in judgment. For as one renowned poet said "No greater responsibility can come to man than to sit in judgment upon a fellow man."

Upon the mere filing of the formal motion to withdraw the plea and to reduce sentence, the Court, without further ado and immediately thereupon compelled the defendant to proceed and in addition thereto to present his evidence upon his motion for a petition for Writ of Coram Nobis which he indicated to the Court he desired to file. Sentence was imposed on September 17, 1946; the motions were filed September 23, 1946. Defendant still had four days to file his petition under the rules, nevertheless he was immediately

required to proceed with his argument and proof. This, in spite of the fact that the Court was advised defendant was not then in possession of his proof and that the invoices which he desired to use were in possession of the Government, the contents unknown to defendant's counsel, and which would show, if produced, no violation of law.

This conduct of the Trial Court, we respectfully submit, was a clear abuse of discretion and a violation of defendant's constitutional rights to the use of the Court's processes to present his cause by the approved and customary practices and forms.

IV.

THE DISTRICT COURT ERRED IN ITS RECEIPT OF EVIDENCE UPON THE MOTION TO VACATE THE PLEA.

At the direction of the Court, the Government produced two witnesses to whom it is claimed that David Kramer, defendant, sold certain meat items and made an over-ceiling charge. Defendant's counsel made an objection to the introduction of any testimony along these lines. The following appears of record:

> "MR. MARCUS: Your Honor, I object to any questions along this line or any dealings as being incompetent, irrelevant and immaterial, and improper at this time.
>
> THE COURT: Well, why is it, Mr. Marcus?
>
> MR. MARCUS: Your Honor, because it raises the issue. If the question is as to this defendant's

guilt or innocence, at this time we should have the benefit of the doubt. He has entered a nolo plea. He is relying upon the fact that an injustice has been done him. We feel at this time that these proceedings—that it is improper to call any witnesses to testify against him." (Transcript of Record, page 170.)

The only issue involved on the various motions was the defendant's plea entered because of a misunderstanding of its effect, or because of misrepresentation, mistake or misapprehension. There was no issue of his guilt or innocence on these proceedings, for every defendant is vested with certain constitutional rights. If some fact occurred which overreached the free will and judgment of the defendant and he is deprived of a trial on the merits, then the only material, relevant and competent evidence at the hearing of his motion was not if he was guilty or could be proved guilty at the trial but whether or not his plea was entered on account of fraud, duress, misapprehension, mistake or other fact overreaching the free will or judgment of the defendant.

As was said in *Bergen vs. United States, supra:*

> "The withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant might or probably would be found guilty . . . And in any case the motion should not be denied when it is evident that the ends of justice would best be served by granting it."

And further in the opinion the Court states:

> "Moreover the question here is not the probable guilt of the accused nor what caused him to change his mind but whether, at the time of the entry of his plea he had the requisite understanding of the charges against him."

The weight and sufficiency of the witnesses' testimony who were brought at the Court's suggestion we shall not comment upon at this time; but suffice to say that not one competent expert witness testified to the O.P.A. ceiling price of the "meat items." The two witnesses whose testimony may be found on pages 169 to 195 of the transcript were interrogated along lines to show the guilt of the accused. This was not a proper subject of inquiry. If the Court permitted such evidence to be introduced, the defendant would then be entitled to bring the expert testimony to rebut this proof. This, then, would have entailed a trial on the merits.

Under this theory the defendant was entitled to the presumption of innocence. The only burden cast upon the defendant was to show that his plea was not fairly entered and not be required to prove his innocence on a motion such as this to vacate the judgment. (See *People vs. Schwarz,* 201 Cal. 309; *People v. Campos,* 3 Cal. 2d 15.)

This in face of the Court's ruling refusing to permit defendant to testify concerning his Commission of the charged offense.

"Q. Will you state to the court at this time whether or not you caused or solicited or attempted or agreed to sell, and did sell, or cause others to sell, under those various [93] counts meat above the ceiling price, and that that would be shown on your invoice statements as contained in the various counts?

THE COURT: The Court isn't going into that now.

This is a motion to set aside the plea of nolo contendere.

MR. MARCUS: Very well." (Transcript of Record, page 112.)

V.

THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS PLEA OF NOLO CONTENDERE.

On September 23, 1946, as indicated before in this brief the defendant was required to proceed on his motion without any supporting affidavits. On suggestion of defense counsel, Mr. Tolin, the United States attorney, proceeded to make a statement to the Court. Mr. Kramer, not knowing there was any case in the office involving him, came to the office of United States attorney and requested to see him. He stated that he was under investigation by the O. P. A., that after previous difficulty with the O. P. A. his family had sold their business and intended to stay out until the end of rationing. At the end of the war, meat

became somewhat plentiful, temptation was out of the way, they returned to business and purchased the Pioneer Provision Company. He soon found his employees engaged in "petty black market activities." Kramer noticed that certain investigators of the O. P. A. "making a career of the Kramers, they were in and out of the Kramer establishment constantly. *There were turning up very petty violations, which parenthetically I might state were the sort of thing we ordinarily decline prosecution upon because they are de minimis.*" (Italics ours.) Transcript of Record, page 80.)

These investigators were constantly harassing Kramer on those petty violations. They suggested to him that he pay them a sum of money which he paid them. Tolin testified:

> "Parenthetically, again, when Mr. Kramer mentioned this to me he wouldn't tell me, at first, who these men were. So finally I thought I recognized them from the method of operation, and things that I had heard. *I asked him to tell me in confidence, for the moment, who they were, and he told me, and he named men who were already under suspicion by our office.*" (Italics ours.) (Transcript of Record, page 81.)

Mr. Kramer was then taken to Mr. Carter and advised if he desired to make a full statement, to make himself available as a witness to provide full information to the investigators and that he would inform the Court of the extent of his cooperation. "We went

ahead and filed this information drawn by Mr. Horgan and filed it."

Special investigators from one of the Government agencies talked to Kramer, went with him in the field; Kramer gave them the name of persons, places and acting on this information the Government investigators "proceeded to build something of a case against the particular individuals . . . those individuals were already under suspicion, they were dismissed from the Office of Price Administration. . . . Mr. Kramer was called one day. I called him and told him to come up to the office. We desired him to testify before the Grand Jury. He came in and said he couldn't afford to go before the Grand Jury and give testimony; that he thought he should be kept in the background because of the fact that these people were people who if he stayed in business in a difficult meat situation again, it might be people with whom he would have to deal. I told him,

> *"Mr. Kramer you know that I am to finally inform the court or our office is to inform the court whether you cooperated with us. So he went in and testified."* (Italics ours.) (Transcript of Record, pages 82-83.)

Mr. Tolin further commented—

> "I don't know which—and in that conversation I stated to him that if he was disposed to continue in his cooperation, and if he wanted to have the government be agreeable, in the event the

court was interested in the government's position on a plea of nolo contendere, that it should be entered without further delay. Mr. Kramer came up that afternoon and entered his plea. . . . I talked with Mr. Marcus and Mr. Kramer. *Mr. Kramer was up and down the halls of the Federal Building constantly, largely at the request of the agents, many times on his own request. He was greatly apprehensive, and he kept asking us for assurance, and we kept assuring him that all we could do would be to inform the court of the extent of his co-operation.*" (Italics ours.) (Transcript of Record, pages 86-87.)

and again:

"MR. TOLIN: I had talked with Mr. Marcus about a nolo contendere plea at an earlier time. But Mr. Marcus—according to Mr. Kramer, Mr. Kramer said, 'Dave Marcus doesn't feel that I should be giving this co-operation to the government in your further investigation, and I would rather come in and deal with you alone'; which he did on many occasions." (Transcript of Record, page 88.)

and further:

"THE COURT: Mr. Marcus was his attorney you knew he was for a week before the plea of nolo contendere was entered?

MR. TOLIN: I didn't know who his attorney was. Mr Marcus had been in to see me, one other attorney had been in to see me. Mr. Kramer would come in without them—

THE COURT: In any event you did talk with Mr. Marcus before?

MR. TOLIN: Yes I did." (Transcript of Record, page 87.)

David Kramer was thereupon sworn and testified.

On May 28th 1946 the date of the filing of the information Kramer conferred with Mr. Tolin at his office in the Federal Building.

"A. I told Mr. Tolin that I had a story to tell him that was off the record, that I would like to talk to him and get [69] his advice on the matter, more or less to find out some information. And he says, 'Well, what is on your mind?'

I told him that I was being checked on my O.P.A. dealings, and he said, 'What is it all about?' And I told him, 'I will tell you what it is all about.'

This is the story I told him: We sold our plant to be rid of what O.P.A. was doing to our business and caused me to be in the predicament that I am in. I said we want to stay out of it. All I know is the meat business, that is all I have been in throughout my life, and my father. He has raised me in the meat business, and he has raised me as a good boy, not as a fellow that goes off the street or anything else. It is a business dealing that I have." (Transcript of Record, page 91.)

"I told Mr. Tolin that that is the conditions that prevailed. We wasn't buying any meat to speak of. We couldn't get $100 worth of meat, where our purchases were over close to $60,000 a week. We couldn't get $100 worth of meat legally.

So these O.P.A. investigators come around, and they found me. They said, 'Why don't you go to work? Why don't you get some meat in here?' I said, 'I can't afford to put any meat in here with you guys watching me.'

I never saw them before up to that time. They never came around but once a week or once every three weeks, and there was only one thing to do, that is, to get some meat in that plant; we couldn't afford to go on like we were; so we got a little meat in there. When they saw some pork come in, they immediately saw me and they said, 'What is this piece of pork here? Spareribs are supposed to be three and a quarter pounds at 18¼ cents, and there is three and a half pounds, it [72] should be 18 cents.' I said: 'Well, I guess the checker missed that.'

THE COURT: You don't need to go into that. This is his reason for violating the law. It is what he told Mr. Tolin that you want to go into, Mr. Marcus. Direct him to that. He is only telling now why he violated the law.

MR. MARCUS: Your Honor, I don't believe he has admitted himself that he did it.

Q. By MR. MARCUS: Did you on any of these occasions make out these statements here or receive any overcharge or above-ceiling violation?

A. I did not." (Transcript of Record, pages 93, 94.)

"Q. By MR. MARCUS: No. The conversation that you told Mr. Tolin.

A. I told Mr. Tolin that they said they had a violation on me, had a few violations on me. They said they were going to take care of everything.

Q. Did you at that time know that these were violations of law?

A. No, sir, I did not.

Q. Is that the reason why you went to Mr. Tolin's office?

A. That is the reason.

Q. Now, did these investigators of the O.P.A. demand any money from you?

A. They did." (Transcript of Record, page 95.)

"Q. How much did he ask you for?

A. $600.

Q. How much?

A. $600.

Q. Did you pay him that amount?

A. I did.

Q. Then what did you do? Did you go to Mr. Tolin's office?

A. I did.

Q. Did you inform him of their actions?

A. I did.

Q. At the plant there?

A. I did.

Q. And their solicitation of money and your payment of money to them?

A. I did.

Q. How much money did you pay them altogether?

A. That was all there was to it, $600." (Transcript of Record, pages 95, 96.)

"Q. All right. Did Mr. Tolin make any statement to you at that time about your co-operation with the government?

A. He did. He told me my co-operation has been fine so far, that he expects it and anticipates me appearing as a government witness. And I said I would.

Q. Now, did he request you to appear before the Grand Jury?

A. He did.

Q. Did you appear before the Grand Jury?

A. I did." (Transcript of Record, pages 96-97.)

"Q. BY MR. MARCUS: Were there any inducements held out to you to bring the other witnesses or jobbers in to testify before the Grand Jury?

A. Mr. Tolin didn't say I would get immunity; they said they would try to help me the best they could; and Mr. Jona Taylor, which was an investigator for the O.P.A., said, 'You know that you won't go to jail for this.' He said, 'I know you won't.' I had more or less his assurance, more than I did anybody else, but—

Q. Who was Mr. Jona Taylor?

A. He is the investigator that investigated against the [77] O.P.A. fellows.

MR. MARCUS: Can you give us his official position?

THE COURT: *Was that statement made in Mr Tolin's presence?*

THE WITNESS: *Yes, sir, it was.*

Q. BY MR. MARCUS: *Who is Mr. Jona Taylor?*

MR. MARCUS: *Do you know what his official position is?*

MR. TOLIN: I don't know his full title. It is Jona, J-o-n-a.

MR. MARCUS: Is he with the investigating department of the O.P.A.?

MR. TOLIN: He works from Washington on investigation of special assignments. I think he is available here." (Italics ours). (Transcript of Record, pages 97-98).

Mr. Kramer testified that Attorney David C. Marcus had represented him prior to the filing of the information.

"Q. BY MR. MARCUS: After my retention you continued to confer with Mr. Tolin and the investigators of the O.P.A., did you not?

A. Yes, sir.

Q. And that was not in my presence, was it?

A. No, sir, it wasn't.

Q. Whenever *there was any* conversation respecting *your case with the investigators* or with the *office of the United States Attorney, did you at any time or was I at any time invited by yourself or the United States Attorney?*

THE COURT: *You don't need to go into that. If there is any matter here—that might be a matter to take up with the Bar Association; that isn't a matter before the court here.*

MR MARCUS: All right." (Italics ours). (Transcript of Record, page 99.)

Kramer testified he had approximately 75 to 100 conferences with the representatives of U. S. Attorneys office, O.P.A. and the special representatives of the Government from Washington.

"Q. BY MR. MARCUS: Did you have any further conversations about your testimony in this case? Will you please tell the court at the time that you testified before the Federal Grand Jury in this case what statement was made to you and by whom and what representations were held out to you?

A. Well, there has been numbers of occasions that I [81] have been up at Mr. Tolin's office, and one occasion I just recall that Mr. Jona Taylor told me, in the presence of Mr. Ernest Tolin, he said, 'You know that Ernie isn't going to let you go to jail. I want the truth; I want to know all about this thing. I am going to tell you that.' He said, 'You know that.' And, of course, he has been over to my house, Jona Taylor has, and he said, 'just let me handle it and you won't have nothing to worry about.'

When I was told to appear before the Grand Jury, I said, 'I better call my attorney, Dave Marcus.' Mr. Tolin called me at my office and said, 'I want you to come up here and appear before the Grand Jury.' I said, 'I want to call my attorney, Dave Marcus.' He said, 'You come on up and let me talk to you first.' I was late getting up before 4:00 o'clock, and Mr. Tolin said, 'Come on in there; the Grand Jury is waiting for you.' I believe it was twenty after four. 'The Grand Jury is waiting for you.' I said, 'don't you think I

ought to consult Dave Marcus first?' He said, 'You have your right, but,' he said, 'the Grand Jury is waiting. We would like to get it over with now, Dave, I want your co-operation if I can get it.' I said, 'All right; here I go.'' (Transcript of Record, pages 101-102.)

"MR. LIVINGSTON: Mr. Taylor's title is Special Agent in Charge, Special Intelligence Division of the Office of Price Administration. It is an organization, an investigative, organization within the Office of Price Administration, something apart from their ordinary investigators.

Q. BY MR. MARCUS: All right. Now, who sent Mr. Taylor [83] and Mr. Jonas to you?

THE COURT: Does he know?

Q. BY MR. MARCUS: Do you know who sent Mr. Jonas or Mr. Taylor to you?

A. Yes, sir.

MR. LIVINGSTON: May I interrupt? His name is Jona Taylor.

MR. MARCUS: All right.

Q. BY MR. MARCUS: Do you know who sent him to you?

A. Yes.

Q. Who did?

A. I was introduced to him in Mr. Tolin's office.

Q. What was said to you at the time?'' (Transcript of Record, pages 103-104.)

"Q. BY MR. MARCUS: Did Mr. Taylor on more than one occasion advise you that you would not get a jail sentence in [86] this case?

A. He has.

Q. At this time and about this same date was there an indictment returned against you and your brother and the Pioneer Provision Company on the grounds of War Frauds or conspiracy?

A. There was.

Q. And at that time were you concerned with that matter?

A. I was.

Q. Were you worried and upset and disturbed about it?

A. I was.

Q. And at that time and about that date did you employ my services to represent you?

A. On that other case, yes.

Q. On the other case?

A. Yes.

Q And did I continue to represent you during that entire matter, and was that indictment returned in this district and before this United States District Court?

A. It was.

Q. Now, you had a trial on that case, did you not?

A. I did.

Q. *And you were found not guilty?*

A. *I was.*

Q. Am I correct? [87]

A. That's right.

Q. Now, were you advised by Mr. Tolin or Mr. *Taylor, or any other person, that this information was of trivial consequence, it was not important. Were you ever advised by any one of them?*

A. I was, yes." (Italics ours.) (Transcript of Record, pages 106-107.)

"Q. BY MR. MARCUS: (Continuing) —— July 26th, do you remember being called by anyone to come to the United States District Court and enter a nolo contendere plea?

A. I was.

Q. *Who called you?*

A. *Mr. Ernest Tolin.*

Q. Where did he call you?

A. *At my office.*

Q. Did you make any statement to him at the time about your desire to confer with your attorney?

A. Yes. He said, 'I have already called Dave Marcus; he will be down here.'

THE COURT: Who said that?

THE WITNESS: Mr. Tolin.

Q. BY MR. MARCUS: All right. Did you tell him that you wanted to confer with me before you came up to the court room?

A. I did.

Q. And what was stated to you?

A. Mr. Tolin said, 'this is the best thing for you, and [89] this is what we would like you to enter into, and it has gone far enough, we can't put it over another day, we want to enter it today.' There was a rush, and you said to me, 'Why is there such a rush about the thing today?' And you said, 'I want to know more about it.' And we was outside here in front of this hall." (Italics ours.) (Transcript of Record, pages 108-109.)

"Q. BY MR. MARCUS: Did you advise your attorney or did you yourself know before you approached the rostrum of the court that you would have to plead to six counts nolo contendere in this Information?

A. No, I was not.

THE COURT: Pardon me, Mr. Marcus. Don't take up the time with asking questions of that kind. You know the defendant didn't have to plead nolo contendere to any count, and you were present and he said nothing was said about it until he was here in court. That is just taking up time unnecessarily. As an attorney you know that wouldn't be proper here. [91]

Q BY MR. MARCUS: Tell the Court if it is not a fact that were it not for the representations made to you by the United States Attorney's Office, and the representative of the United States Attorney's office, that you would not have entered your plea of nolo contendere to this Information?

A. I would not have entered a plea of anything else but not guilty." (Transcript of Record, page 110.)

On September 24, 1946, at 1:00 P. M. Mr. Tolin was requested to be sworn by the Court.

His testimony appears as follows (see footnote):

"Q. BY MR. MARCUS: Is it not a fact, Mr. Tolin, that I stated to you not once, but on several occasions, that I did not approve of any conversations regarding this case or any other case, or any statements by Mr. Kramer in the absence of his attorney, or any statements to the United States Attorney's office regarding the commission of any acts by any official of the United States Department of the O. P. A.?

A. You did come into the office on an occasion when Mr. Kramer was there giving us information. I stated to you that Mr. Kramer was in cooperation in

Jona Taylor, special agent of the O. P. A., testified as follows:

"A. We handle special investigations. That either may take in corruption within the O. P. A., or major price violations throughout the country.

Q. When Mr. Kramer began his co-operation with the government in discussing with Mr. Tolin bribes that he had paid to O. P. A. officials, it was your division that undertook the investigation of that matter?

A. That is true.

Q. And from that time on did you have conferences and discussions with Dave Kramer—

---

the investigation we were making of certain O. P. A. officials and you then said that you did not believe in people giving testimony against others with whom they had been associated, and you didn't favor Dave Kramer's giving us the information, and if he did it you didn't want to know about it. I think you then left.

Q. Now, is it not a fact that upon the date that this plea of nolo contendere was entered you called my office?

A. Yes." (Transcript of Record, pages 129-130.)

"Q. Isn't it a fact that I stated to you at that time that I had no knowledge of the fact that he desired to enter his plea? You stated to me you discussed it on the telephone with him, and he would be up shortly before the court, and that I could meet him there and discuss the matter with him?

A. I don't recall whether I told you that we called him or not. In fact, I don't recall whether I told Mr. Kramer the time he was in. He was in and out of the office a great deal.

Q. Do you remember me making a statement to this effect: I said, 'Mr. Tolin, do you know whether or not the court will accept a nolo contendere plea?'" (Transcript of Record, page 130.)

"Q. Do you remember making the statement in your office to me that you felt that this violation was a technical violation, that because of certain meats being cut in a certain manner that it was not on any serious consequence?

A. No. I told you that the men to whom Kramer had paid bribes had hounded him on *mere technical violations that wouldn't have been interesting to us anyway, but that that had been a means by which they brought to Kramer's attention the fact that they were there, were working on him, and opened up the way to an offer of a bribe.*" (Italics ours.) (Transcript of Record, pages 134-135.)

"THE WITNESS: I have said at times that so far as I was concerned I would be satisfied if Mr. Kramer received a substantial fine. I have said that. If that helps Mr. Marcus any. I want to be fair with what I have said." (Transcript of Record, page 135.)

THE COURT: I don't want to go into all of those matters. Just that one point. It will make the cross examination too lengthy.

A. Yes, I did." (Transcript of Record, page 138.)

He denied stating to Mr. Kramer that "Ernie won't let you go to jail." (Transcript of Record, page 139.) and further (see footnote):

"Q. Did he tell you at that time—did he say, 'Do you think I might get a jail sentence?'

A. Yes, I think he did.

Q. And didn't you say to him, 'You co-operate with us in this matter and I am sure that Ernie won t let you down?'

A. No, I did not say that. I can explain, I think, what I did say.

THE COURT: You may do that.

THE WITNESS: I told him that the only thing that we were in a position to tell him was that I was sure the United States Attorney's office would undoubtedly make known to the court the degree of his cooperation in helping clean up a stinking mess, if he did co-operate.

Q. BY MR. MARCUS: Did he co-operate?

A. He did to a certain extent, yes." (Transcript of Record, page 141.)

"Q. BY MR. MARCUS: Didn't you tell him that you would have to have his co-operation if he wanted to get any help from the government?

A. I can say—I think I can recall the exact words I did tell him. They were if he was going to co-operate he would have to co-operate, and he couldn't go half way; that if the United States Attorney's office was to be in a position of telling the court that he had co-operated, he had to assist them [125] in such a manner that they would be in that position." (Transcript of Record, page 142.)

"Q. BY MR. MARCUS: Is it a fact that on the occasion that you were at Mr. Kramer's home and overheard certain conversations between him and the O. P. A. officials, after they had left you stated to Mr. Kramer substantially the following language: 'This was really a good deal. I got everything that we needed. You will certainly receive our help and co-operation, and don't worry about your case now?'

A. No, I don't remember that conversation. There was some conversation, but not in those words, not quite to that extent.

THE COURT: What was it?

THE WITNESS: I told him that I thought we heard every word that had been said; that we were in a beautiful position to hear the entire conversation, and that he did engineer the [128] conversation just right to bring out all of the information he had given us. And Mr. Kramer asked me if I thought he was co-operating. I said, 'Yes, you certainly are, and I will make that fact known to Mr. Tolin, just exactly what has happened and how far you have gone; and I don't think up to this time that we could expect you to give further co-operation than you have to this point, but you are not through yet, Dave, there is lots more that has to be done if you are going to bring the whole thing out.'

A. Mr. Kramer told me that he was—a couple of days later, that he was not going to do anything further until his case had been disposed of, that he wanted his case dismissed before he gave any further co-operation. I said, 'Dave, I have told you before I have nothing whatsoever to do with your case, and that would be asking too much. Mr. Tolin told you he would not dismiss your case; the only thing he would do would make the fact known to the court your degree of

David Marcus, defendant's counsel, testified (see footnote):

"I stated to Mr. Tolin I didn't feel it proper that my client should go and discuss the matter with him unless it was in my presence, but if he wanted to continue the conversations with him, that was up to him.

During the course of the investigation and while the [131] investigation was proceeding I received a call from my client. I called Mr. Tolin after that and told him my client felt and had advised me that *he should be granted immunity on this particular case* because of his sincere co-operation with the government in the matters that they were investigating. Mr. Tolin stated to me that he didn't feel that he could grant him immunity on this case, but that he would give him all assistance possible.

I didn't hear much about it after that until one day I received a call from Mr. Tolin. He said, 'I have just talked to Dave Kramer, and this office is determined that we are not going to proceed—carry this case along any further, it is taking up too much of the routine of this office, and Mr. Kramer will have to enter his plea today.'

I believe that was early in the afternoon, your Honor, and it was after 2:00 o'clock.

I said, 'How could the court take the plea today?' I said, 'What plea is he going to take, and what counts is he going to plead to?'

He said, '*The government is willing to accept a nolo plea,' and that he and Mr. Taylor had discussed the matter with the court and that the court was willing to accept a nolo plea.*

I said, '*Are you sure of that?*' And he said, '*Yes, I am sure that we can enter a nolo plea.*'

I said, '*I haven't discussed the matter with my client.*' [132]

I said, 'I know that he has stated to me on several occasions that he wants immunity and he felt that this case should be dismissed, *and that you felt that it was not of any serious consequence.*' So he said, '*No, we are not going to carry this along any further; you will have to come up this afternoon. I have instructed Mr. Kramer to be here.*'

So I immediately came up to this court room, and Mr. Tolin was here, and I began to discuss the matter with him. I said, '*Mr. Tolin, I am not in favor of entering this plea.*'

He said, '*Well, Dave is and I think we ought to dispose of it.*'

I said, 'I haven t had an opportunity of discussing it with him, what counts or what the plea should be.'

So he said, '*We are willing to take six counts on this matter.*'

I said, '*If it is agreeable with my client, it is agreeable with me. Have you discussed the matter with him?*' *And he said, 'Yes, I have.*'

I went over and talked with Mr. Kramer, and he said he didn't know what to do. He said Mr. Tolin called him and advised him he would have to enter his plea today.

And I went back to Mr. Tolin and said, '*Isn't it possible to continue this matter until morning and give me an opportunity to discuss this case with my client?*' *And he said no, he felt it had gone long enough.* [133]

I said, '*Mr. Tolin, you know I am not acquainted with the details or facts of this case. Your office has been and now is in possession of all of the statements concerning the commission of these offenses, and I have no knowledge concerning the details of it.*'

He said, 'It is not of serious consequence and we will make the statement known to the court.'

I said, '*Well, there hasn't even been any ruling—there has been no filing of that bill of particulars.*'

He said, '*It won't be necessary now.*'

So I said, '*What assurance can you give us that Mr. Kramer is not going to jail?*'

He said, '*We are going to make all the facts known to the court, and in our opinion we feel that Mr. Kramer will not go to jail.*'

I said, '*Can I convey that information to my client? You know he is very worried, and he has got these other cases?*'

And he said, '*Yes, you can.*'

So I went over and talked with Mr. Kramer, and Mr. Kramer stated, 'Well, how am I going to be sure about it?' And I said, 'I am not sure about it.'

So I went back to Mr. Tolin and I said, '*Mr. Tolin, I haven't discussed the matter with the court; you stated to me that you have; supposing the court does sentence him to jail,*' I stated, '*Would you have any objection or would you* [134] *object to the withdrawal of his plea?*' I said, '*He has been promised your co-operation, and you know he has cooperated, and the other officials as I have been advised, he promised his co-operation.*'

And he said, '*Yes, I am willing to do that.*'

So I went back and told Mr. Kramer, 'Now, it is up to you,' I said, '*I don't know what the facts even are about this case. I have never been furnished with a bill of particulars.*'" (Italics ours.) (Transcript of Record, pages 148 to 151.)

On cross-examination the witness testified (see footnote):

"Q. You stated that Mr. Tolin told you that, in your opinion, Mr. Kramer was not to go to jail, which Mr. Tolin has denied, and you have also told us that Mr. Tolin said that he would be willing to allow the plea to be withdrawn after it was entered, which Mr. Tolin has denied.

A. I don't think he has denied that. He says he did not remember. [138]

Q. Neither of those matters, Mr. Marcus, were called to the attention of the court yesterday, were they?

A. Yes, they were. Immediately at the close of this session we made the statement to the court, and Mr. Tolin stated he wanted to think about it over night. Do you remember that?

Q. I remember it. But it was not brought to the attention of the court yesterday?

A. Yes, it was." (Transcript of Record, page 155.)

"A. Yes: and I also advised my client, too, that I relied upon the representations of your office, and that I believed that he could rely upon the representations of Mr. Tolin.

Q. Which representation could he rely upon?

A. The ones that I have related from this stand; the ones that he has related from this stand.

Q. The representations that Mr. Tolin would call to the attention of this court, the degree of co-operation which Mr. [141] Kramer had given?

A. And that he would not go to jail.

Q. You mean to say as an attorney, Mr. Marcus, you relied on that representation?

The two witnesses Justo Briseno and William Henry Houser whom the Court directed the United States Attorney to produce, to testify concerning the transactions had with defendant, Kramer, over objection of defendant's counsel, that the guilt or innocence of the defendant was not involved in this motion and therefore the testimony was irrelevant were permitted to be sworn and testify (Transcript of Record, page 170) Briseno, a driver for the Pioneer Provision Company in their truck delivered certain meat items consisting of "2 small bolognas," on invoice No. 2405. (Transcript of Record, page 173.)

He paid $19.76 for a hind of beef to the driver. About a month later he paid Dave Kramer $3.12 at the Pioneer Plant.

> "THE COURT: When you paid this three dollars and something that you say, three cents a pound to defendant Kramer, was there anything said by you or him at that time?
>
> THE WITNESS: No, nothing. It was already understood that I was to pay three cents per pound on beef.
>
> MR. MARCUS: I move that be stricken.
>
> THE COURT: It may go out." (Transcript of Record, page 175.)

A. As an attorney I have relied upon the word and the representations of The United States Attorney's office. Otherwise I would not have permitted him to enter his plea of nolo in this case.

Q. Knowing that he could not bind the court?

A. Knowing that he could not bind the court. And knowing that the statement was made to me that there would be no objection to his withdrawal of his plea." (Transcript of Record, pages 157-158.)

On cross-examination the witness testified as follows (see footnote):

Not one word of testimony was given as to the ceiling price of the meat delivered; the grade of meat or any competent testimony that would assist the Court in determining whether or not there had been an actual over-ceiling violation.

"THE COURT: When you said 'paid over,' you mean paid over what?

THE WITNESS: Over ceiling, I imagine.

THE COURT: Let the imagination go." (Transcript of Record, page 178.)

"Q. BY MR. MARCUS: How many purchases approximately did [163] you make from the Pioneer Meat Company altogether and receive statements for them?

A. It is hard to say offhand by memory.

THE COURT: Well, approximately.

THE WITNESS: About seven or eight.

Q. BY MR. MARCUS: How many times have you seen Dave Kramer?

A. About four or five.

THE COURT: Did you pay him money each time?

THE WITNESS: When I went to the plant I did, yes.

THE COURT: Well, the four or five times you saw him, did you pay him money each time, or did you not?

THE WITNESS: Yes, I went to settle for the meats that were delivered to me." (Transcript of Record, pages 178-179.)

"Q. BY MR. MARCUS: Now, let me ask this: You say you only paid it over on beef?

A. On beef only.

Q. Do you know that it was over the ceiling price? Yes or no.

A. Yes.

Q. How do you know that?

A. According to the price of the meats. All grocers are well informed on prices.

Q. Did you check the prices on beef on February 18, 1946?

A. I believe I did, yes, at the time.

Q. Did you?

A. I did.

Q. Where did you check them?

A. In the list the O. P. A. sends out.

Q. And how much was it at that time?

A. I don't recall. Seventeen or eighteen cents.

Q. Seventeen or eighteen?

A. Well, that is just guessing.

THE COURT: He said he doesn't remember.

THE WITNESS: I don't remember." (Transcript of Record, pages 179-180.)

The testimony of William Henry Houser was less intelligent then the former witness. He testified (see footnote):

At the close of argument by both Government and defense counsel the rulings were continued on three occasions until October 2, 1946—when all motions were

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"Q. Is it also true that you don't know what the ceiling was on all of the invoices?

A. I don't know what the ceiling was on those invoices, but I presume that the Pioneer was charging ceiling.

MR. MARCUS: I move that the latter part be stricken as calling for his conclusion.

THE COURT: The motion is denied. You asked him about it and he gave his explanation. He presumed, he stated, at the time that he bought the meat that the ceiling price was charged by the Pioneer.

Is that what you paid the cashier?

THE WITNESS: Yes, your Honor, I did.

THE COURT: Then you went over and paid Dave Kramer?

THE WITNESS: Dave Kramer, on the side, yes.

Q. BY MR. MARCUS: Who told you that it was ceiling?

A. I said I presumed it was ceiling on the invoice.

Q. Did any one tell you that it was ceiling?

A. No, no one told me.

Q. Dave Kramer didn't tell you that it was ceiling, did he, on the invoice? [177]

A. No; but he told me that it was overage, in that cooler." (Transcript of Record, pages 190-191.)

"Q. BY MR. MARCUS: The question was you don't know and didn't know at that time what the ceiling price was?

A. That's right, and I still don't know today what the ceiling price of beef is, pork or ham.

Q. Do you know or did you know at any time that there were different grades of beef?

A. Sure, I knew there were different grades of beef.

Q. Did you know and do you know now that there were different prices for different grades of beef?

A. Sure, there are different prices for different grades. [179]

Q. As to any of the grades of beef, you have no knowledge now or never did have any knowledge concerning the ceiling price of that particular grade of beef?

A. I don't get your question.

Q. You don t know now and you never knew what the ceiling price was of the different grades of beef?

A. I don't recall the prices on the ceiling prices of different grades, no." (Transcript of Record, pages 192-193.)

denied and defendant ordered committed. Appeal was immediately filed and defendant released upon posting $5,000 bail pending appeal.

We do not desire to unduly argue this point as we have incorporated all the evidentiary facts in this brief and our argument on this point was amply set forth in the Transcript of Record, pages 194 to 215 and pages 226 to 232 which we beg this Court to read.

We earnestly believe that under the authority of *Ward vs. United States,* 116 Fed. 2d 135; *Bergen vs. United States,* 145 Fed. 2d 181; *People vs. Schwarz,* 201 California Reports 309; *People vs. Campos,* 3 Cal. Reports 2d 15, the motion to withdraw the plea should have been granted.

The *Bergen case supra* is particularly in point. Defendant was charged with mail fraud and conspiracy. He first entered a plea of not guilty.—"Counsel for the United States thereafter sought to induce him to change his pleas and testify against others considered more deeply involved. They promised to recommend a sentence that would involve no imprisonment and assured appellant that pleas of guilty would result in no more than a fine or suspended sentence or both *though they could not state definitely what punishment would be imposed."* (Page 136 of the Opinion.)

Defendant changed his plea co-operated with the "Government" and appeared and testified for the Government.

These facts are identical with the instant case.

The Court refused to follow the recommendation of the probation officer in the *Kramer case* recommending a fine and *no imprisonment* and the suggestion of the United States Attorney for a fine. (Transcript of Record, page 243.)

In the *Bergen case supra* the lower court refused to follow the recommendation and sentenced the defendant to prison. Permission to withdraw the plea was denied.

The Court through Justice Arant reversed the lower court and stated:

> "[1] We do not find that this question has been decided by any federal appellate court. The prevailing view, however, appears to be that the trial court's denial of leave to withdraw a plea of guilty is examinable on review to determine whether such denial is in accord with the exercise of a sound judicial discretion. State v. Maresca, 85 Conn. 509, 83 A. 635; Gardner v. People, 106 Ill. 76; Myers v. State, 115 Ind. 554, 18 N. E. 42; Little v. Commonwealth, 142 Ky. 92, 133 S. W. 1149, 34 L. R. A., N. S., 257, Ann. Cas. 1912D, 241; State v. Hill, 81 W. Va. 676, 95 S. E. 21, 6 A. L. R. 687.
>
> [2] It is not error to refuse leave to withdraw the plea if the defendant fully understood his rights, the nature of the charge against him, and the consequences of such a plea. Miller v. State, 160 Ark. 245, 254 S. W. 487; Pope v. State, 56 Fla. 81, 47 So. 487, 16 Ann. Cas. 972; State v. Raponi,

32 Idaho 368, 182 P. 855; State v. Williams, 45 La. Ann. 1356, 14 So. 32; Hubbell v. State, 41 Wyo. 275, 285 P. 153. On the other hand, it is error to deny leave to withdraw the plea when it was entered because of misunderstanding of its effect or because of misrepresentation. Krolage v. People, 224 Ill. 456, 79 N. E. 570, 8 Ann. Cas. 235; Mounts v. Commonwealth, 89 Ky. 274, 12 S. W. 311, 11 Ky. Law Rep. 474; State v. Nicholas, 46 Mont. 470, 128 P. 543; State v. McAllister, 96 Mont. 348, 30 P. 2d 821. There is ample precedent among the state court decisions for the view that it is reversible error to refuse leave to withdraw the plea under circumstances such as appear in the case at bar. Griffin v. State, 12 Ga. App. 615, 77 S. E. 1080; East v. State, 89 Ind. App. 701, 168 N. E. 28; State v. Stephens, 71 Mo. 535; State v. Cochran, 332 Mo. 742, 60 S. W. 2d 1; Sloan v. State, 54 Okl. Cr. 324, 20 P. 2d 917."

VI.

THE SENTENCE IS EXCESSIVE

Mr. Tolin stated to the Court that the offense was a "very petty violation, which parenthetically I might state was the sort of thing that we ordinarily decline prosecution upon because it is Deminimis." (Transcript of Record, page 80.)

Mr. Livingston, United States Attorney, admitted to the Court that even under the Government position "the whole thing didn't amount to very much, $150 as to all six counts. With that I agreed." (Transcript of Record, page 222.)

To fine a man $3,000 and one year in jail to a "Deminimis" charge "petty violation" involving $150 is to our mind a very severe sentence, and we respectfully believe should be permitted to stand in view of the entire record of this case and the recommendation of the Probation Officer. Probation Officer's report, Transcript Report, pages 207-210 inclusive.

We respectfully submit that the motions be granted and the cause reversed.

DAVID MARCUS,
Attorney for Appellant, David Kramer.